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APPENDIX.

Supreme Court of the United States

OCTOBER TERM, 1968

No. 131

CARMINE VINCENT PALMIERI,

Petitioner,

—v.—

FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR CERTIORARI FILED AUGUST 10, 1967
CERTIORARI GRANTED MAY 27, 1968

Supreme Court of the United States

OCTOBER TERM, 1968

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CARMINE VINCENT PALMIERI,

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—v.—

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IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

FEBRUARY TERM, 1965

THE STATE OF FLORIDA

vs.

CARMINE VINCENT PALMIERI

INFORMATION FOR ROBBERY—Filed March 10, 1965

IN THE NAME AND BY AUTHORITY OF THE STATE OF FLORIDA:

RICHARD E. GERSTEIN, State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, information makes that CARMINE VINCENT PALMIERI on the 6th day of February, 1965, in the County and State aforesaid, did unlawfully make an assault in and upon one LOY DIEHL and did by force and violence and putting in fear, feloniously rob, steal, take and carry away from the person, immediate possession, care, custody and control, and against the will of the said LOY DIEHL, certain monies, goods and chattels, to-wit: CASH in the sum of ONE HUNDRED DOLLARS ($100.00), good and lawful money of the United States of America, a further and more particular description of said property being to the State Attorney unknown, said property being the subject of larceny and the property of, to-wit: U-TOTE'M OF MIAMI, INC., a Florida Corporation, in violation of 813.011 Florida Statutes,

contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

/s/ Richard E. Gerstein
State Attorney,
Eleventh Judicial Circuit
of Florida

STATE OF FLORIDA:
COUNTY OF DADE:

Personally appeared before me, RICHARD E. GERSTEIN, State Attorney of the Eleventh Judicial Circuit of Florida, who, being first duly sworn, says that the allegations set forth in the within Information are based upon facts that have been sworn to as true, and which facts, if true, would constitute the offense therein charged.

/s/ Richard E. Gerstein
State Attorney,
Eleventh Judicial Circuit
of Florida

Sworn to and subscribed before me this 9th day of March, 1965.

J. F. MCCRACKEN
Clerk,
Criminal Court of Record,
Dade County, Florida

By /s/ [Illegible]
D. C.

SEAL: CRIMINAL COURT OF RECORD

Defendant CARMINE VINCENT PALMIERI arraigned in open Court on the within Information and pleaded Not Guilty.

/s/ [Illegible]

Deputy Clerk,
Criminal Court of Record,
Dade County, Florida

Case No. .....

CRIMINAL COURT OF RECORD
DADE COUNTY, FLORIDA

THE STATE OF FLORIDA

vs.

CARMINE VINCENT PALMIERI

INFORMATION FOR ROBBERY

WITNESSES FOR THE STATE

1. Loy Diehl
   and
2. Ronald Diehl
   c/o U-Tote'M
   1265 NW 103 St.
   751-9598
3. J. Kahn DCSO
4. W. Webb DCSO
5. D. Parker DCSO

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

No. 65-1857 (Williams)
65-1858
65-1859
65-1860
65-1861
65-1862

THE STATE OF FLORIDA

-vs.-

CARMINE VINCENT PALMIERI

MOTION TO QUASH—Filed July 19, 1965

Defendant, through counsel, moves the Court for an Order quashing each and every of the aforesaid charges on the grounds that:

1. Defendant was originally arrested, at home, without a warrant or probable cause and was incarcerated in the Dade County Jail for some twelve days before any charges were filed against him, (and only then because of counsel's petition for a writ of habeas corpus).
2. Defendant was never afforded a preliminary examination pursuant to Chapter 902, Florida Statutes.
3. Denial of a preliminary examination to the Defendant violated his rights to due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States and Sections 11, 12 and 22, Declaration of Rights, Constitution of the State of Florida.
4. Defendant was prejudiced by denial of a preliminary examination in that, while he was unlawfully in-

carcerated without being heard to demand the nature and cause of the accusation against him, the prosecution was able to gather the only evidence herein by subjecting Defendant to repeated police lineups until evidence could be collected against him.

5. Defendant was also prejudiced in that he had the right to be heard by a magistrate and discharged, upon finding that no offense had been committed or that there was no probable cause to believe the Defendant guilty thereof. Had Defendant been taken before a magistrate pursuant to Fla. Stat. Chapter 902 upon his arrest Defendant would have been discharged as the only evidence against him was gathered *after* his arrest and while he was incarcerated.

MATTHEWS AND MANDINA
Attorneys for Defendant
608 Ainsley Building
Miami 32, Florida
CAREY MATTHEWS

[Certificate of Service (omitted in printing)]

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

No. 65-1857 (Williams)
65-1858
65-1859
65-1860
65-1861
65-1862

THE STATE OF FLORIDA

-vs.-

CARMINE VINCENT PALMIERI

MOTION TO SUPPRESS—Filed July 19, 1965

Defendant, through counsel, moves the Court for an Order suppressing evidence herein taken by police officers and/or Highway Patrol officers on the grounds that:

1. Such evidence was obtained in an unlawful manner, in violation of Defendant's rights to due process, guaranteed by the Fourteenth Amendment of the Constitution of the United States and of his right to be secure in his person, papers and effects as guaranteed by Section 22 Declaration of Rights, Florida Constitution.
2. The evidence in this cause was obtained while Defendant was unlawfully incarcerated in the Dade County Jail without having been afforded a preliminary examination pursuant to Fla. Stat. 902.01-.19.
3. During Defendant's incarceration, in which no charges were filed against him for some 12 days (and only then because of filing of a petition for habeas corpus by the undersigned), Defendant was placed through line-

up after lineup and evidence was gathered against him although he had been denied his rights under the aforesaid constitutional provisions and Fla. Stat. 902.01-.19 and thereby prejudiced.

MATTHEWS AND MANDINA
Attorneys for Defendant
608 Ainsley Building
Miami 32, Florida
CAREY MATTHEWS

[Certificate of Service (omitted in printing)]

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

No. 65-1862 (Williams)

THE STATE OF FLORIDA, PLAINTIFF

-vs.-

CARMINE VINCENT PALMIERI, DEFENDANT

MOTION TO SUPPRESS—Filed September 22, 1965

Comes now the Defendant by and through his undersigned attorneys, and moves to suppress all of the State's evidence in this cause on the grounds that all of said evidence has been obtained in violation of the constitutional rights of the Defendant; more specifically in violation of Sections 11 and 12, Declaration of Rights, Florida Constitution and Articles IV, V, VI and XIV of the United States Constitution.

Pursuant thereto Defendant alleges that he was arrested on March 1, 1965, when police officers called at his home without a warrant and brought him to the Dade County Jail for interrogation, that thereafter the Defendant was held in violation of the laws of the State of Florida, and particularly Section 901.23 thereof, and was not taken before the nearest and most accessible magistrate without unnecessary delay and in fact was never taken before a magistrate for a preliminary hearing in denial of his rights both statutory and constitutional.

Thereafter and while being illegally held without any physical evidence whatsoever of crime, although his home and person had been searched on arrest, and the Defendant was subjected to repeated interrogation and line-ups until the State succeeded in having a person identify him as an alleged participant in a robbery.

That the Defendant was illegally held for a period of ten days from March 1, 1965 to March 10, 1965, without an Information being filed charging him, and without being taken before a magistrate.

That as a result and due to the aforesaid illegal detention witnesses were proded by the State and eventually one did identify him as aforesaid and therefore said illegal detention operated to the great prejudice of the Defendant in that he was compelled to appear in line-ups against his wishes and that the only evidence which the State has in connection with this cause was obtained by reason of said illegal detention.

WHEREFORE the Defense moves for suppression of all evidence against the Defendant obtained as a result of the illegal detention. The Defendant makes no move to suppress any evidence obtained by the State other than that obtained by reason of the aforesaid illegal detention.

MATTHEWS AND MANDINA
Attorneys for Defendant
608 Ainsley Building
Miami 32, Florida
/s/ Carey Matthews

[Certificate of Service (omitted in printing)]

[1]

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

No. 65-1862

THE STATE OF FLORIDA, PLAINTIFF

vs.

CARMINE VINCENT PALMIERI, DEFENDANT

Miami, Florida

Transcript of Testimony—September 22, 1965

* * * *

APPEARANCES:

SAM A. ALTER, ESQ., and
CHARLES D. EDELSTEIN, ESQ.,
Assistant State Attorneys,
On behalf of the Plaintiff.

CAREY MATTHEWS, ESQ.,
Of the firm of Matthews & Mandina,
On behalf of the Defendant.

* * * *

[2] MR. MATTHEWS: I would like to make a motion out of the hearing of the jury panel.

THE COURT: All of the jurors will have to leave the Courtroom and remain outside until you are called.

(Thereupon the jury panel left the Courtroom.)

THE COURT: All right. Make your motion.

ORAL MOTION TO SUPPRESS EVIDENCE
AND DENIAL THEREOF

MR. MATTHEWS: I would like to make a motion to suppress the evidence and quash the Information on the

grounds the Defendant was in repeated lineups until somebody identified him. He was arrested without a warrant, without reasonable cause, that they just went to his house and arrested him. They had no evidence against him. The arrest was invalid. They took him down to the Dade County Jail where he was invalidly held in violation of 901.23 for ten days during which they filed no Information. After ten days, they filed Informations against him, after I filed a Writ of Habeas Corpus and then they filed an Infomation; but the State has committed two crimes [3] in order to bring this man to trial. One, he has been illegally arrested. Two, he has been illegally detained in violation of Section 901.23. Naturally, this would be under the rule of the McNabb Case. He has been prejudiced. He has been prejudiced in this case. The evidence gathered against him was gathered after his arrest. There was no evidence against him when he was arrested. He was arrested to be held, interrogated, and held in lineups until the State could find some reason to charge him, which is, I would say, the most basic violation of the Constitution of the United States and the State of Florida and the Statutes of the State of Florida that could possibly occur.

Since the evidence was gathered as a result of the invalid arrest and invalid detention, we ask that it be suppressed. The only evidence is that he was picked out of the lineup God knows how many days after he had been illegally arrested and illegally detained. It is our contention the State has no right to do that.

THE COURT: They may not have a right. Do you have any Case Law that says—that throws out any lineups?

MR. MATTHEWS: No, not to this particular situation. It has arisen in the cases of Mowery and McNabb, [4] and the State cases usually say there has to be some prejudice. They have to go on the fact the Defendant hasn't been prejudiced and in this case, he has been prejudiced by his arrest.

THE COURT: It may be our State Courts have never said just what the circumstances would be for prejudice.

MR. MATTHEWS: But unless they have attached significance to the facts in the cases that have come to the attention of the Florida Supreme Court, there has been a prompt filing by the State Attorney which, of course, would be the alternate method to proceed, so they have indicated this was part of their reason for finding no prejudice, a prompt filing on it as far as the State Attorney, but this is an exact reverse situation here where ten days passed before filing, and then the filing was only as a result of a Habeas Corpus filed by the Defendant, so we take away from the prior Florida cases the situation of prompt filing.

We also add to the Florida cases a situation of the most high possible prejudice to the Defense in that there was no evidence until after he was arrested, and that his incarceration was the manner by which the evidence was obtained. He was repeatedly put in lineups against [5] his protest until finally somebody identified him. There is no other evidence except his identification from the lineup obtained after the invalid arrest and the invalid detention took place.

THE COURT: The motion is denied.

* * * *

[12] LOY DIEHL

was called as a witness on behalf of the Plaintiff, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ALTER:

* * * *

[26] Q Now, would you indicate what, if any, physical characteristics you took notice of particularly with regard to this man who held the gun on you?

A Yes, I got a very good look at his face.

Q Could you describe his face?

A Yes, he had a prominent nose, a shallow chin, thin [27] chinline. He had a stub of a beard. At that time, he had pimples on his face and his hair was long and

curly back here, very bad need of a haircut. I could tell his hair was curly because of the ringlets that were back there.

Q His hair was protruding from the hat?

A Protruding from the hat, yes.

Q How tall was he?

A Five six.

Q Now, you say that rather positively. Have you ever had any experience in your life with regard to identifying persons?

A Yes.

Q What did that consist of?

A Well, in the Marine Corps I was in the Military Police.

Q How long was that?

A Three years.

Q Did you have any specific police-type training that you received in that connection?

A Yes, sir, the Marine Corps paid for a course through the Marine Corps Institute of Criminal Investigation.

Q Did any portion of that course involve identification?

[28] A Yes, a major part of it involved identification.

Q Based upon your observations of this man, could you with any degree of accuracy indicate his approximate weight?

A Yes. At that time, it was—

MR. MATTHEWS: Object to that question. The man isn't qualified as an expert to say what anyone's weight is. I don't know anyone is qualified as an expert to say that. Certainly, there is nothing to indicate the witness is unless he is a carnival man.

THE COURT: Overruled.

Q (By Mr. Alter) Mr. Diehl, could you, with any degree of accuracy, estimate the weight of the man?

A One hundred and thirty pounds.

Q Now, from your physical observations of him and everything that you took notice of, could you, with any degree of accuracy, estimate his age, his apparent age, if you recall from that time?

A No, not with any accuracy.

MR. MATTHEWS: Excuse me. I didn't hear that question. Would you read that question back?

[29] (Thereupon the question and answer referred to were read by the Reporter as above recorded.)

Q (By Mr. Alter) Did you have an opportunity to observe his manner of walking or his gait?

A Yes. When he followed us down the aisle, his gait was a very wide gait, very wide.

Q How much conversation did you have with him all together?

A Very little.

Q Was there anything noticeable about his manner of speech?

A Yes, very definitely, I would call it a Brooklyn accent.

Q Have you ever known anybody from Brooklyn or that area—

A Yes.

Q —that have spoken in a similar fashion?

A Yes, I have.

Q Were there any other distinguishing features that you took notice of of this individual at the time?

A I tried to remember as much as I could but I believe that is it.

• • • •

[32] Q And did you, in connection with this loss, make any certain reports to your supervisor or member of the store?

A Yes, I also called my supervisor.

Q Was that on the same day?

A Immediately after I called the police.

Q Let me ask you this: Do you see the holdup man in this Courtroom today, Mr. Diehl?

[33] A Yes, I do.

Q Would you get up and walk over to the man?

A This is the man.

MR. ALTER: Indicating the Defendant.

Q (By Mr. Alter) Is there an appreciable difference in his appearance today as compared to his appearance as you recall it back on the 6th of February?

A He is heavier.

Q How about the complexion?

A Same complexion.

Q How about the hair, as much as you could see it?

A The hair was just a little bit longer then.

Q Is there any question in your mind but that this is the same person?

A This is the same person.

MR. ALTER: Let the record reflect that the witness identified the Defendant, Carmine Vincent Palmieri.

Do you want to have a seat again?

THE COURT: Take the stand.

Q (By Mr. Alter) Now, in connection with your reporting this matter to the police, after the initial report [34] to the initial officer that same day, were you subsequently contacted by any other members of the police department?

A Yes, I was, Detective Kahn.

Q Now, can you recall when you first had contact with him?

A Yes, Detective Kahn brought a number of photographs to the store one evening when I happened to be working and asked me to make an identification if I could from any of the photographs that he had.

Q How many photographs did he bring?

A It was a number of them, over a half a dozen.

Q And did you view those photographs?

A Yes, I viewed them and picked out one.

Q And do you recall how long after the robbery this was?

A Several days.

Q Did you have any further contact with any investigating officers in connection with this matter?

A Yes, it was a couple of weeks later that I was called early in the morning for a lineup.

Q About what time of the day or night was it that you received this call?

[35] A I received the call about 1:30 in the morning.

Q And where did you go in response to this call?

A To the Justice Building or Metropolitan Building over here. I am not sure exactly what it is.

Q And what occurred at that time, Mr. Diehl?
A I was asked to make an identification from the lineup.
Q Now, can you describe in your own words how this lineup was conducted and what occurred?
A Yes, there is two rooms. One room has a one-way glass in it. It is a small room for the person who is going to do the identifying to stand; and then, the people in the lineup are in the larger part of the room. It is well lighted and they are all numbered.
Q Now, was there anybody with you at the time you viewed the lineup?
A Yes, Detective Kahn.
Q Did you receive any specific instructions with regard to viewing the lineup?
A Only to stand back well away from the glass because of the reflection in it.
[36] Q And how long did you view the lineup?
A Ten minutes all together.
Q How many people were in the lineup?
A Six.

* * * *

[65] RONALD DIEHL

was called as a witness on behalf of the Plaintiff, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ALTER:

* * * *

[70] Q Could you indicate to us about how long all of this took, that is to say, from the first time you saw this robber until he was gone?
A About five minutes.
Q And out of that five minutes, you had him under your observation for about how long?
A About one to two minutes.
Q What did the robber say to you, if anything, just prior to the time he left?

A He told us to go into the back room and said, "Now, relax and have a cigarette and don't come out hollering."

Q Is that what you and your father did?

A Yes, sir, we remained there for about a minute and then we came out and called the police.

Q When you came out and called the police, was there anybody in the store at all?

A No, sir.

Q Now, at any time later, were you ever contacted by any of the investigating officers?

A Yes, sir.

[71] Q Do you recall who that was that contacted you?

A No, sir, I don't.

Q Did you ever have occasion to go with the police down to the Sheriff's Office?

A Yes, sir.

Q Do you remember when that was approximately?

A Three or four weeks after the robbery.

Q And what happened when you went down to the Sheriff's Office then?

A They had a lineup and they wanted me to see if I could identify the man.

Q And how many people were in that lineup?

A I believe there were five.

Q Now, when you viewed the lineup, could you tell us what the physical setup was, how you went about doing that, where the people were lined up, and where you were?

A They were on sort of a stage platform and between me and them was a screen and I was on one side of darkness and they had bright lights shining in their faces.

Q Was there anybody in the viewing area with you at that time?

[72] A Yes, there was an officer.

Q Have you seen him here today?

A Yes, sir.

Q Do you know his name?

A I believe it was Detective Kahn.

Q Now, did he give you any specific instructions as to what you were to do when you were viewing the lineup?

A No, he just told me to notice each one as they went through the different steps and not to say anything until they were all finished.

Q So how long did you look at these people in the lineup?

A About three, four minutes.

MR. ALTER: I would like to have this marked as State's Exhibit 1-B for Identification.

(The document referred to was thereupon marked "State's Exhibit 1-B for Identification.")

Q (By Mr. Alter) Ronnie, I am going to show you State's Exhibit 1-B for Identification, a photograph, and ask you if that accurately represents the individuals who were in that lineup that you observed?

A Yes, sir.

Q Did you identify any of the people who are depicted [73] in that picture?

A Yes, I did.

Q And does that particular individual bear a number?

A Yes, sir.

Q And what number is that?

A It is number five.

* * * *

[74] Q Did anybody tell you to pick out any certain one of these people in that lineup?

A Oh, no, sir.

Q After the robbery took place, did anybody ever give you any instructions or further description of the holdup man?

A No, sir.

Q Now, you have indicated that the holdup man was dressed all in black. Just briefly, if you could describe his clothing for us.

A Well, he had on black shoes and socks, black trousers, and he had on a black trenchcoat and he had a derby-like hat with a small rim or brim or something like that and dark sunglasses.

Q How close in feet did you ever come to this individual at the time of the holdup?

A Do you mean the closest?

Q Yes.
A Two feet.
Q Did you have an opportunity to look at him at that time?
A Yes, sir.
[75] Q Now, Ronnie, do you see that individual in the Courtroom today?
A Yes, sir.
Q Could you get up from the witness chair—
THE COURT: He doesn't have to get up. Just point him out, if you will.
THE WITNESS: The Defendant, right there.
MR. ALTER: Let the record reflect the witness has identified the Defendant, Carmine Vincent Palmieri.

* * * *

[76] CROSS EXAMINATION

BY MR. MATTHEWS:

* * * *

[81] Q When was the first time you talked to the police about the robbery you yourself?
A Well, about five to ten minutes after the robbery, a policeman came to fill out a report.
Q And you gave him your story?
A Yes, sir.
Q And your father gave his at the same time?
A Yes.
Q And you were both there together and gave your stories together?
A Yes.
Q After that occasion, when was the next time that you talked to the police about the case?
A Oh, that same day, a man came in.
Q When?
A A little after noon and he took me down to the police station to identify somebody that they thought was the bandit.
Q Right.
[82] A And I looked at him and it wasn't.
Q Did your father go with you on that occasion?

A No, sir.

Q Did you give your story to your father's supervisor at the time of the robbery when he came to the store?

A No, sir, I did not.

Q Were you there when the supervisor came?

A No.

Q Any reason why you didn't tell him the story?

A I just wasn't asked any questions. He was asking my father about it.

Q Were you there when your father spoke to the supervisor?

A Yes, sir, I was.

Q And you heard your father's story?

A Yes.

Q After the occasion when you went down for the first time to see the police downtown, when was the next time that the police had you out on this case?

A About three weeks later.

Q Was that the time when you said you saw the line-up?

[83] A Yes.

Q And who took you downtown?

A My father did.

Q You went down with your father?

A Yes.

Q To the same lineup?

A No, sir.

Q You and your father went downtown to this lineup?

A He took me down to see a lineup myself.

Q You rode down together in the car?

A Yes, sir.

Q Did you discuss the crime?

A No.

Q Didn't talk about it at all?

A He just told me to be sure before I picked out anybody. That is all.

Q Do you know whether at this time he had already picked somebody out?

A Yes, he did.

Q He had already picked somebody out?

A Yes, sir.

Q And did he describe to you who he picked out?
A No, sir, he did not.
[84] Q He didn't tell you who he picked out?
A No, sir.
Q He didn't tell you at all?
A He just told me that he had picked out the man.
Q He didn't tell you anything about the man's description?
A No, sir, he did not.
Q Didn't talk about him being five foot six?
A No, sir.
Q I noticed that you said that the man you identified today in Court, the Defendant, you said that he appeared heavier to you?
A Yes, sir.
Q Have you discussed today with your father the appearance of the Defendant?
A Briefly, yes.
Q Did you both agree that he looked heavier?
A Yes, sir.
Q On the day of the lineup when you got down there, was your father with you?
A Yes.
Q And Detective Kahn?
A In the actual lineup, my father was outside.
[85] Q Where was Detective Kahn?
A He was in there with me in the lineup.
Q What did Detective Kahn say as he ran them through for you?
A He instructed me to watch each man as he went through the motions and not to make a permanent decision until all of them had gone through it.
Q Did he tell you the one your father picked out?
A No, he did not.
Q In the hallway before you took a look at the lineup, did you discuss the question of the lineup with Detective Kahn and your father?
A With Detective Kahn.
Q What about your father?
A No, sir.
Q Actually, you picked the smallest man in the lineup, did you not?

A Yes.
Q Is that why you picked him?
A No, it isn't.
Q That was a factor in it, wasn't it?
A Yes.
Q How many men were in the lineup?
A I believe there were five.
[86] Q Were the rest of the men in the lineup other than the one you picked out quite husky? They were quite husky, were they not?
A No, sir, they weren't.
Q What I mean by husky, I mean, they were sturdy?
A I believe one or two of them were.
Q Were there any there that were very thin and light?
A No, sir.
Q Just the one you picked?
A Yes, sir.
MR. MATTHEWS: That is all.
MR. ALTER: Nothing further of this witness.
Thereupon—

JACK KAHN

was called as a witness on behalf of the Plaintiff, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. EDELSTEIN:

Q Mr. Kahn, will you tell the jury your full name and residence address.
A Jack Kahn; 8872 Jodie, Des Plaines, Illinois.
[87] Q How long—Are you employed at the present time?
A I am General Manager of the Sinclair Machinery Company, Chicago, Illinois.
Q And prior to this job, did you have any jobs in the Florida area?
A Yes, sir, I did.
Q And where was that?

A I was a Deputy Sheriff right here in Dade County, Florida.

Q And how long were you so employed?

A Seven years.

Q What was the date when you left the Sheriff's Office?

A July 31, 1965.

Q For what reason did you leave the Sheriff's Office?

A I was recently married and my father-in-law offered me a position with his company which I accepted, a better future, I thought.

Q In the course of your official duties in the month of March of last year, did you have occasion to conduct a lineup?

A Yes, sir, I did.

Q Did that lineup include the Defendant in this case, [88] Carmine Vincent Palmieri?

A Yes, sir, it did.

Q Is he in this Courtroom today?

A Yes, sir.

Q Would you point him out?

A Right over there.

MR. EDELSTEIN: For the record, indicating the Defendant.

Q (By Mr. Edelstein) Tell me, do you notice any difference between the Defendant's physical appearance today and his physical appearance back in March when you held the lineup?

A Not greatly, maybe just in the coloring, which is obvious, sir.

Q Now, when you conducted this lineup, how many men were in the lineup?

A I believe six.

Q Now, I am referring first to the lineup which took place when Mr. Diehl, the older Mr. Diehl, identified Mr. Palmieri. How many men were in that lineup?

A I believe six, but I would have to see the photograph.

Q When you were at that lineup, did you give any instructions to Mr. Diehl?

[89] A None whatsoever. The only instructions I did give him was to view the lineup, take his time, and be sure, and that if he recognized the individual who held him up, to please tell me his number.

Q Now, did he in fact identify the Defendant Palmieri?

A Yes, he did.

Q Now, were there any pictures taken of this lineup?

A Yes, there was.

Q And who took the pictures?

A I did.

Q I show you State's Exhibit 1-A and ask you if you can identify it?

A Yes, this is the picture I took in the Sheriff's office lineup room right over here on 14th Street.

Q Now, in the picture, which one is the Defendant in this case?

A Number three.

Q And this picture is from which lineup?

A This is the first lineup which occurred March the 2nd at 2:30 in the morning which the senior Mr. Diehl observed.

Q Now, is that picture an accurate representation of [90] the lineup as you conducted it?

A Yes, it is.

Q Now, you say there was a second lineup?

A Yes.

Q When did this take place?

A I believe approximately six days later, to be exact, March 8, 1965, as the lineup plat indicates.

Q Were you present at this lineup?

A Yes, sir.

Q Was the Defendant present at that lineup?

A Yes, sir.

Q Now, did you conduct that lineup?

A Yes, sir, I did.

Q And did you take any pictures of that lineup?

A Yes, sir.

Q Did you take that picture of that lineup? I mean State's Exhibit 1-B?

A Yes, sir.

Q Does that picture clearly and accurately depict the lineup as you viewed it?

A Yes, sir.

Q All this took place in Dade County, Florida?

A Yes, sir.

[91] Q And both these pictures were taken pursuant to your official duties as a police officer?

A That is correct.

MR. EDELSTEIN: Nothing further, Judge.

I would move to introduce those pictures into evidence.

MR. MATTHEWS: Are you offering them now?

MR. EDELSTEIN: Yes.

MR. MATTHEWS: I object to them both, your Honor, and may I ask a few questions of Detective Kahn?

THE COURT: Yes.

MR. MATTHEWS: Detective Kahn, I show you State's Exhibit No. 1-B for Identification and ask you where that was taken?

THE WITNESS: This picture was taken in the hallway or the foyer of the jail.

MR. MATTHEWS: Out by the elevators?

THE WITNESS: Yes, sir.

MR. MATTHEWS: That is not where the person looked at the lineup, is it?

THE WITNESS: No.

MR. MATTHEWS: All right, your Honor, I object to it. It does not depict the actual lineup, that it is actually a photograph taken in the hallway somewhere.

MR. EDELSTEIN: Not somewhere. It is in the Dade [92] County Justice Building.

This State's Exhibit 1-B, this picture was taken where?

THE WITNESS: This was taken in the hallway where the lobby is, and the reason it is taken there—

MR. EDELSTEIN: Address it to the jury so they can hear you.

THE WITNESS: The reason we have to take it here is because the lineup room in the jail is a small room and we cannot take a accurate photograph because of the screen; and in order to take the photograph like this, we have to stand back approximately twenty feet; and if we stand back twenty feet in the jail lineup room, the

screen distorts the photograph, so we just march them out of the room and into the hall and take the picture after the identification is made.

MR. EDELSTEIN: And do they march out in the same order as when the identification is made?

THE WITNESS: Yes, sir.

MR. EDELSTEIN: I have nothing further, and the State once again moves to introduce into evidence both pictures.

MR. MATTHEWS: Right now I am directing my attention to State's Exhibit 1-B and this has been represented to the jury as depicting the lineup. Now, the [93] State's witness, the young gentleman, told this jury this is what he saw. Actually, your Honor, we have the testimony of Detective Sgt. Kahn that this is not what he saw. This is a picture taken elsewhere and is not a photograph of the lineup; and the witnesses have previously testified that this is an accurate reproduction of what they saw in the lineup and it is not, if your Honor please, and I ask it not be received into evidence. It is just not what the State's witnesses have claimed it was. They said this is what they saw and it obviously isn't, and anyone can see it is a picture taken in the hallway. It is not the lineup.

MR. EDELSTEIN: Without getting into extensive argument, the State feels there is no reason why these pictures can't go to a jury. We are not attempting to withhold any kind of evidence.

THE COURT: Just a moment.

Mr. Kahn, you say those are exactly in the same order as when viewed by the witnesses?

THE WITNESS: Yes, sir, and we have a corresponding sheet to show the order in which they stood; and I believe the State Attorney has the sheet that goes with this photograph.

MR. MATTHEWS: If your Honor please, the Defense has further objections. The witness, Detective Kahn, has [94] brought up there is something about the shape of the room and the sheet or screen or whatever it is and that is the reason why they can't take the picture. Now, if there is something about the room that you can't take

a picture accurately, then how can somebody looking into the room see accurately. I mean, it just is not what the person sees when he looks through that screen, which Detective Kahn has testified to, and if they are going to introduce a picture of a lineup, it has to be what the man sees. If there is a distortion and they don't want to take a picture of the distortion, as I understand the testimony of Detective Kahn, the jury should know it and this picture shouldn't be put into evidence as to what a man sees through that lineup screen when it isn't.

Further, the fact that these men are in the alleged order they were in in this so-called lineup room, God knows what kind of gear they had on, hats, outfits, wigs, etc. I don't know. All he has testified to is that they are in the same order; and your Honor, that is not an accurate depiction of the lineup they saw, that they testified they saw, and now we find out they didn't see it and here they told you it was exactly what they saw.

THE COURT: Well, the Court is going to admit it [95] into evidence as State's Exhibit 1.

(The photograph referred to was thereupon marked "State's Exhibit 1.")

MR. MATTHEWS: We have the same objection to State's Exhibit 1-A for Identification.

THE COURT: Overruled. Admitted into evidence as State's Exhibit No. 2.

(The photograph referred to was thereupon marked "State's Exhibit 2.")

MR. EDELSTEIN: I have nothing further of this witness.

THE COURT: Cross examination.

CROSS EXAMINATION

BY MR. MATTHEWS:

Q Detective Kahn, you brought down Mr. Loy Diehl, did you not, in the middle of the night to see the lineup?

A Yes, sir.

Q What day was that?

A March the 2nd. He came down pursuant to a phone call from myself.

Q And the other lineup, what was the date of it that you brought down his son, do you recall?

A His son came down, I believe, on March the 8th.

[96] Q When did you arrest the Defendant?

A When did I arrest the Defendant?

Q Yes.

A I didn't arrest him. He was arrested by my authority.

Q What date?

A March the 2nd or March the 1st. I am not sure. I think it was March the 1st at approximately 1:30 a.m.

Q He was arrested under your authority pursuant to your authority?

A Yes.

Q Did you present him for preliminary hearing before any magistrate or judicial officer?

A No, sir.

Q Now, Detective Kahn, as a law enforcement officer, are you familiar with the state law that requires he be produced before a magistrate without unreasonable delay?

A Sure. This is late at night.

MR. EDELSTEIN: Excuse me. I have to object to this.

THE COURT: Sustained.

MR. MATTHEWS: Your Honor, it is very material as to the bona fide character of the lineup.

[97] I am trying to show that this entire lineup is subject to question, that the manner of his detention and the lineup itself is subject to question.

THE COURT: It is a legal proposition which you already have in the record.

MR. MATTHEWS: I am trying to impeach the lineup.

MR. EDELSTEIN: We argued this before.

MR. MATTHEWS: I am not claiming a legal dispute. I am trying to impeach the lineup per se. I am

trying to say that the lineup was not held in a legal normal fashion.

THE COURT: That is something that is not for the jury to determine about the legality of the lineup.

MR. MATTHEWS: Not the legality, but whether it was accurate and fair is certainly a question.

MR. EDELSTEIN: Judge, if the Court please, if we are going to argue this thing further once again, could we do it out of the presence of the jury? We are not arguing a matter of fact, we are arguing a matter of law and the law is for you to decide and the facts are for the jury to decide. Now, we argued it once before.

MR. MATTHEWS: I would like the jury to hear [98] all the facts.

THE COURT: But you are arguing law now which doesn't concern the jury.

MR. MATTHEWS: Do you wish me to discontinue that line of questioning?

THE COURT: You can go into the circumstances, but not the question about the committee magistrate.

MR. MATTHEWS: All right.

Q (By Mr. Matthews) Prior to taking Mr. Diehl, Sr. down, had you shown him pictures of various persons—

A Yes.

Q —out of your folders?

A Yes, sir.

Q Had you done it with Mr. Diehl, Jr.?

A No, sir.

Q Did you discuss prior to Mr. Diehl, Jr. viewing the lineup the makeup of the lineup with him, who was going to be in the lineup or anything of that nature?

A No, sir.

MR. MATTHEWS: I don't think I have any further questions.

MR. EDELSTEIN: Nothing further from this witness.

* * * *

[129] Miami, Florida
September 27, 1965

* * * *

[130] MR. MATTHEWS: Your Honor, the Defense has a motion for a new trial.

THE COURT: All right. Proceed.

MR. MATTHEWS: Comes now the Defendant and moves for a new trial upon the following grounds, that the verdict is contrary to the law, contrary to the evidence, contrary to the law and evidence, that the Court erred in failing to allow the Defendant to proceed with questioning of the State's witnesses as to the illegal detention of the Defendant in violation of Statute 901.23 of the Florida Statutes to the prejudice of the Defendant, that the Court erred in permitting into evidence photographs of the lineup to the prejudice of the Defendant, and that the Court erred in failing to grant the motion to quash and motion to suppress all evidence based on the illegal detention of the Defendant in violation of Section 901.23 of the Florida Statutes, all to the prejudice of the Defense, inasmuch as there was no material evidence other than that obtained subsequent to the illegal detention.

THE COURT: Motion denied.

* * * *

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

Case No. 65-998

CARMINE VINCENT PALMIERI, APPELLANT

vs.

THE STATE OF FLORIDA, APPELLEE

An Appeal from the Criminal Court of Record for Dade County, Gene Williams, Judge.

Matthews & Mandina and Michael Lipsky, for appellant.

Earl Faircloth, Attorney General and Barry N. Semet, Assistant Attorney General, for appellee.

Before PEARSON, BARKDULL and SWANN, JJ.

Aug. 10, 1966

PER CURIAM—Opinion filed August 9, 1966

This is an appeal from a judgment, upon conviction of robbery, in the Criminal Court of Record for Dade County. The judgment was entered pursuant to a jury verdict, and the defendant was sentenced to a term of 20 years in prison.

On Monday, March 1, 1965, the defendant was arrested at his home without a warrant and was incarcerated in the Dade County Jail where he was interrogated. Defendant was never taken before a committing magistrate.

He was identified by a prosecution witness (Loy Diehl) at a line-up which was held at the County Jail on March 3, 1965.

On March 10, 1965, after defendant had filed a petition for writ of habeas corpus, the State filed an information charging him with robbery.

At the trial, the case for the prosecution consisted of the testimony of Loy Diehl (the operator of the store that was robbed) and his son, Ronald, and their identification of the defendant; the testimony of the law enforcement officer who had ordered the defendant's arrest and had conducted the line-ups; and the testimony of the officer who had made the initial investigation.

Appellant has presented two points as follows:

> "Point I. Whether the defendant's detention for ten days, upon an arrest without a warrant, and without his being taken before a magistrate, while incriminating evidence was gathered against him from repeated lineups, amounted to a denial of due process of law pursuant to the Florida Constitution, Section 12, Declaration of Rights and United States Constitution, Fourteenth Amendment.
>
> "Point II. Whether there was insufficient evidence to support the verdict."

Appellant admits that the appellate courts of this State have frequently held that a defendant has not been denied due process of law where evidence has been obtained from him prior to a preliminary hearing. See Milton v. Cochran, Fla. 1962, 147 So.2d 137; Montgomery v. State, Fla. 1965, 176 So.2d 331.

Appellant urges that his case goes beyond the cases cited because the record demonstrates that the violation of Section 901.23,[1] Fla. Stat. 1963, resulted in a grave prejudice to him in his defense. It is urged that if the directions of the statute had been followed, the magistrate would have been required to release the defendant for lack of probable cause to retain the defendant in jail.

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[1] Section 901.23, Fla.Stat. 1963, provides:

Duty of officer after arrest without warrant.—An officer who has arrested a person without a warrant, shall without unnecessary delay take the person arrested before the nearest or most accessible magistrate in the county in which the arrest occurs, having jurisdiction, and shall make before the magistrate a complaint, which shall set forth the facts showing the offense for which the person was arrested; or, if the magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county.

It is pointed out that the evidence against the defendant was procured at the jail subsequent to the time at which the appellant would have been released if he had been taken before a magistrate. On this basis, appellant urges that reversal is required under the decisions of the Supreme Court of the United States in McNabb v. U. S., 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819, and Watts v. Indiana, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801. See also People v. Hamilton, 359 Mich. 410, 102 N.W.2d 738 (1960), and Vorhauer v. State, Del. 1965, 212 A.2d 886.

Appellant's point appears to have been decided against him by our opinion in Shea v. State, Fla. App. 1964, 167 So.2d 796. See also DiBona v. State, Fla. App. 1960, 121 So.2d 192. We therefore adhere to our prior opinion on this point.

Appellant's Point II is without merit once it is determined that the evidence obtained at the line-up was admissible.

Affirmed.

IN THE SUPREME COURT OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.
May 5, 1967

Case No. 35,880

CARMINE VINCENT PALMIERI, PETITIONER

vs.

STATE OF FLORIDA, RESPONDENT

Writ of Certiorari to the District Court of Appeal, Third District

Michael A. Lipsky and Matthews and Mandina, for Petitioner

Earl Faircloth, Attorney General, and Barry N. Semet, Assistant Attorney General, for Respondent

ROBERTS, J.—Opinion filed May 3, 1967

The District Court of Appeal, Third District, affirmed a judgment of the trial court based on a jury verdict convicting petitioner Palmieri of robbery. The cause was certified to this court under Article V, Section 4(b), of the Constitution of Florida, in that the decision passed upon a question of great public interest because "it concerns a determination of when the denial of a preliminary hearing in violation of § 901.23, Florida Statutes, is prejudicial to a defendant." On application of the petitioner a writ of certiorari was issued.

The defendant was arrested at his home about 1:30 in the morning without a warrant, was not taken before a committing magistrate, but was incarcerated in the Dade County jail. The next day he was identified in a lineup at the jail by a prosecution witness. Ten days after the arrest and after he had filed a petition for writ of habeas corpus, the state filed an information charging him with robbery. The jury found him guilty and he was sentenced to twenty years in prison.

Appellant Palmieri presented two points to the district court which are under review here:—

"(1) Whether the defendant's detention for ten days, upon an arrest without a warrant, and without his being taken before a magistrate, while incriminating evidence was gathered against him from repeated lineups, amounted to a denial of due process of law pursuant to the Florida Constitution, Section 12, Declaration of Rights, and the United States Constitution, Fourteenth Amendment.

"(2) Whether there was insufficient evidence to support the verdict."

The district court determined in reference to point (1) that the evidence obtained at the lineup was admissible, and that therefore point (2) was without merit.

The cases petitioner relies on in seeking a reversal of the trial and district courts are: McNabb v. United States (1943), 318 U.S. 332, 63 S.Ct. 608; Watts v. Indiana (1949), 338 U.S. 49, 69 S.Ct. 1347; People v. Hamilton (1960), 359 Mich. 410, 102 N.W.2d 738; Vorhauer v. State (1965), 212 A.2d 886. These decisions are not decisive of this case inasmuch as they involve admission of extra-judicial confessions and the due process clause of the Fourteenth Amendment which makes the exclusionary rule mandatory *in federal cases.*

Petitioner contends that "due process of law should be extended to include a right to a preliminary hearing in the State of Florida upon a charge of a felony" and contends that had he been so presented, the magistrate would have released him inasmuch as the evidence against him was procured at the jail *subsequent* to his incarceration. He thus reasons that the failure to follow § 901.23, F.S. (the preliminary hearing statute) was prejudicial to him. The statute provides:—

> "An officer who has arrested a person without a warrant, shall without unnecessary delay take the person arrested before the nearest or most accessible magistrate in the county in which the arrest occurs,

having jurisdiction, and shall make before the magistrate a complaint, which shall set forth the facts showing the offense for which the person was arrested; or, if that magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county."

It is apparent that the defendant should have been taken before a magistrate without unnecessary delay under the statute. The attorney general has stated "the statute should be complied with", Op.Atty.Gen.—048-73; the federal courts have ruled in the above cited McNabb case, and Mallory v. United States (1957), 354 U.S. 449, 77 S.Ct. 1356, that the failure to comply is a denial of *due process under federal law;* and we have noted that the continued failure of officers to comply cannot be condoned, Milton v. Cochran (Fla. 1962), 147 So.2d 137. However, under this statute a preliminary hearing is for the purpose of determining if probable cause exists to hold one accused of a crime for trial. Rouse v. State (1902), 44 Fla. 148, 32 So. 784; Davis v. State (Fla. 1953), 65 So.2d 307; Baugus v. State (Fla. 1962), 141 So.2d 264. It is not an indispensable prerequisite to the filing of an information, DiBona v. State (Fla.App.1960), 121 So.2d 193; Davis v. State, supra, and is not a necessary step in criminal proceedings. Shea v. State (Fla. App.1964), 167 So.2d 796; Baugus v. State, supra. "A prosecution may be instituted and maintained regardless of whether such a hearing is or is not held, and regardless of whether probable cause to hold the accused for trial is or is not found." Montgomery v. State (Fla. 1965), 176 So.2d 331, 384 U.S. 1023 (cert. denied).

A plea of not guilty was entered, no admissions were made, the *defendant did not ask to be taken before the magistrate,* did not testify at the trial, and no question of illegal arrest was involved on appeal. It therefore appears to us that there has been no showing of prejudice and that to reverse both the trial court's judgment which was based on a jury verdict, and the subsequent affirmance by the district court, would constitute a miscarriage of justice.

Furthermore, § 54.23, Florida Statutes, provides:—

> "No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or *criminal*, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed." (Emphasis supplied.)

And § 924.33, F.S. provides:—

> "No judgment shall be reversed unless the appellate court after an examination of all the appeal papers is of the opinion that error was committed which injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant."

No harmful error appearing, the decision of the district court here under review is approved and the writ of certiorari heretofore issued is discharged.

It is so ordered.

THORNAL, C.J., THOMAS, DREW and O'CONNELL, JJ., concur.

SUPREME COURT OF THE UNITED STATES

No. 585 Misc., October Term, 1967

CARMINE VINCENT PALMIERI, PETITIONER

v.

FLORIDA

On petition for writ of Certiorari to the Supreme Court of the State of Florida.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—May 27, 1968

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1469 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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